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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANA B. OTT
Office of the Solicitor
Department of the Interior
Washington, D.C. 20240

RICHARD A. CORREA
Office of the General Counsel
Department of Energy
Washington, D.C. 20585

QUESTIONS PRESENTED

1. Whether consumers of oil and gas and state governmental entities that own off-shore oil and gas lands have standing to challenge the federal government's selection of bidding systems for lease sales of oil and gas rights in federal submerged lands on the Outer Continental Shelf.

2. Whether Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II) 1337(a), enumerating specific bidding systems for lease sales of oil and gas rights on the Outer Continental Shelf, imposes any obligation on the Secretary of Energy to promulgate regulations for any particular experimental system or the Secretary of the Interior to use any such system in actual lease sales.*

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* The named defendants in the district court and appellees in the court of appeals were Cecil D. Andrus, who was Secretary of the Interior, James R. Schlesinger, who was Secretary of Energy, and the United States of America. Because Secretary Watt and Secretary James B. Edwards are the successors to Secretaries Andrus and Schlesinger, we have substituted them as federal parties to this suit, pursuant to Rule 40.3 of the Rules of this Court.

The named plaintiffs in the district court and appellants in the court of appeals were Energy Action Educational Foundation, Consumer Federation of America, Consumer Energy Council of America, Michigan Citizens Lobby, Arkansas Consumer Research, Inc., Service Employees International Union, International Association of Machinists, Citizen/Labor Energy Coalition, Texas Consumer Association, M. James Doling, Paul Casagrande, Kathleen F. O'Reilly, California State Lands Commission, and City of Long Beach.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	14
Argument:	
I. The respondents lack standing to sue	16
II. There is no obligation under the Act to promulgate regulations for, or to experiment with, any particular alternative bidding system	25
A. The statutory language is unambiguous	25
B. The legislative history is consistent with the statutory language	31
Conclusion	40
Appendix A	1a

TABLE OF AUTHORITIES

Cases:

American Society of Travel Agents, Inc. v. *Blumenthal*, 566 F.2d 145, certiorari denied, 435 U.S. 947	21
Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252	16
Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	21
Best v. *Humboldt Mining Co.*, 371 U.S. 334	26
Consumer Federation of America v. *FPC*, 515 F.2d 347	20
Consumers Union of United States, Inc. v. *FPC*, 510 F.2d 656	20
Consumers Union of United States, Inc. v. *Sawhill*, 525 F.2d 1068	20

Cases—Continued Page

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 22
Flast v. *Cohen*, 392 U.S. 83 17
Linda R. S. v. *Richard D.*, 410 U.S. 614 18
Reiter v. *Sonotone Corp.*, 442 U.S. 330 20
Rubin v. *United States*, No. 79-1013 (Jan. 21, 1981) 26
Schlesinger v. *Reservists To Stop The War*, 418 U.S. 208 24
Sierra Club v. *Morton*, 405 U.S. 727 22
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 16, 18, 22
United States v. *California*, 332 U.S. 19 2
United States v. *Louisiana*, 339 U.S. 699 2
United States v. *SCRAP*, 412 U.S. 669 17
United States v. *Texas*, 339 U.S. 707 2
United States v. *Wilbur*, 283 U.S. 414 26
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 26
Warth v. *Seldin*, 422 U.S. 490 ..... 16, 18, 22
Western Mining Council v. *Watt*, 643 F.2d 618 24

Statutes:

Clean Air Act, 42 U.S.C. 1857h-2 23
Coastal Zone Management Act of 1972, 16 U.S.C. 1451 26
Department of Energy Organization Act, 42 U.S.C. (Supp. II) 7101 *et seq.*:
42 U.S.C. (Supp. II) 7152(b) 5, 28
42 U.S.C. (Supp. II) 7153 5
42 U.S.C. (Supp. II) 7153(b) 29
42 U.S.C. (Supp. II) 7153(c)(1) 29
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 26
16 U.S.C. 1540(g) 23
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 26
Ocean Dumping Act, 33 U.S.C. 1415(g) 23

Statutes—Continued Page

Outer Continental Shelf Lands Act, ch. 345, 43 U.S.C. 1331 *et seq.* 2
43 U.S.C. 1331(a) 2
43 U.S.C. 1334(a)(1) 28
43 U.S.C. 1337(a) 28
Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. II) 1331 *et seq.* 2, 4
43 U.S.C. (Supp. II) 1331(b) 29
43 U.S.C. (Supp. II) 1334(a) 29
43 U.S.C. (Supp. II) 1337(a) 4
43 U.S.C. (Supp. II) 1337(a)(1) 5, 26, 29-30, 38
43 U.S.C. (Supp. II) 1337(a)(1)(A) 5, 8, 9, 15, 19, 25, 26, 27, 30, 32, 33
43 U.S.C. (Supp. II) 1337(a)(1)(A)-(G) .. 28
43 U.S.C. (Supp. II) 1337(a)(1)(B) ...5, 6, 8, 9, 15
43 U.S.C. (Supp. II) 1337(a)(1)(C) 5, 9, 11, 30, 31
43 U.S.C. (Supp. II) 1337(a)(1)(D) 5, 9, 30
43 U.S.C. (Supp. II) 1337(a)(1)(E) 5, 6, 9, 13
43 U.S.C. (Supp. II) 1337(a)(1)(F) 5, 9, 30
43 U.S.C. (Supp. II) 1337(a)(1)(G)..5, 6, 9, 13, 30
43 U.S.C. (Supp. II) 1337(a)(1)(H) 5, 6, 9, 15, 28, 30
43 U.S.C. (Supp. II) 1337(a)(4)(A) 6
43 U.S.C. (Supp. II) 1337(a)(5)(B) 6, 11, 26, 27, 31, 32, 36, 37
43 U.S.C. (Supp. II) 1337(a)(6) 29
43 U.S.C. (Supp. II) 1337(a)(9)(D) 7, 27, 29
43 U.S.C. Supp. II) 1337(g)(2) 21
43 U.S.C. (Supp. II) 1343(2)(A) 27
43 U.S.C. (Supp. II) 1344 7
43 U.S.C. (Supp. II) 1344(a)-(f) 29
43 U.S.C. (Supp. II) 1349(a)(1) 14-15, 23, 24
43 U.S.C. (Supp. II) 1349(d) 12
43 U.S.C. (Supp. II) 1802 4
Submerged Lands Act of 1953, ch. 65, 67 Stat. 29, 43 U.S.C. 1301, *et seq.* 2

Miscellaneous: Page

Cabot Consulting Group, *Competition on the Outer Continental Shelf and Its Implications for Competition in Downstream Markets*, DOE Contract No. DE-AC01-79RA35011 (July 14, 1980) 8

123 Cong. Rec. (1977):

pp. 23232-23245 36
p. 23242 38

124 Cong. Rec.:

p. H190 (daily ed. Jan. 25, 1978) 38
p. H197 38
p. H420-H424 (daily ed. Jan. 31, 1978) 38
p. H424-H428 38
p. H429-H430 38
p. H430-H431 38
p. H599 (daily ed. Feb. 2, 1978) 38

45 Fed. Reg. (1980):

p. 9536 ..... 8, 9
p. 36784 9
p. 49586 9

46 Fed. Reg. (1981):

p. 20522 9
pp. 20526-20527 ..... 1a
p. 22468 7
p. 29681 ..... 4a
p. 29682 25
p. 29680 9

H.R. Rep. No. 95-590, 95th Cong., 1st Sess. (1977) 4, 8, 23, 27, 33, 35, 36, 38, 39

H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. (1978) 32, 38, 39

H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. (1979) 23

H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. (1980) 23, 32

Outer Continental Shelf Lands Act Amendments of 1977: Hearings on H.R. 1614 Before the House Ad Hoc Select Comm. on OCS, 95th Cong., 1st Sess., pt. 2 (1977) 19, 25

Miscellaneous—Continued Page

Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) 25

S. Rep. No. 95-284, 95th Cong., 1st Sess. (1978) 35, 36, 38

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-54a) and the district court (Pet. App. 57a-73a) are not reported. An earlier opinion of the court of appeals in this case (Pet. App. 75a-100a) is reported at 631 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980 (Pet. App. 55a-56a). The petition for a writ of certiorari was filed on February 27, 1981, and was granted on April 6, 1981 (App. 270). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. II) 1331 *et seq.*, are reprinted in Pet. App. 101a-106a.

STATEMENT

In this action, certain consumer groups and state governmental entities seek to compel the Secretary of Energy to issue regulations for, and the Secretary of the Interior to use, various bidding systems in awarding leases for oil and gas exploration and development on the Outer Continental Shelf (OCS).

1. This Court determined in *United States* v. *California*, 332 U.S. 19 (1947), *United States* v. *Louisiana*, 339 U.S. 699 (1950), and *United States* v. *Texas*, 339 U.S. 707 (1950), that the federal government, rather than the coastal states, has paramount rights over the marginal seas. Congress thereupon enacted in 1953 the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* and the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462, 43 U.S.C. 1331 *et seq.*, to cede the three mile coastal belt of submerged lands to the states and to provide for the leasing to private industry of mineral resources in the more seaward area remaining subject to federal jurisdiction, the OCS.[1]

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[1] The OCS includes all submerged lands of the shelf lying seaward of the areas ceded to the coastal States by the Submerged Lands Act, "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. 1331(a). See Pet. App. 76a-77a n.2.

The OCS Lands Act empowered the Secretary of the Interior to lease tracts for the exploration and development of mineral resources, including oil and gas, and directed him to establish and administer a leasing program. In the 56 oil and gas lease sales held from 1954 through 1980, 3,919 leases have been issued covering approximately 19.03 million acres.[2] Approximately 2,250 of these leases are still in force and over 1,000 of them are producing oil and gas. Hydrocarbon production from the OCS is a significant element in our national energy supply. About 5.3 billion barrels of oil and 50 trillion cubic feet of natural gas have been produced from the OCS.[3] Moreover, production of oil and gas from the OCS is highly beneficial to the U.S. economy because it is significantly less costly than the imported oil it replaces. The Federal Government receives, and can expect to receive, substantial income from the OCS leasing program in the form of bonuses,[4] royalty and profit share payments,[5] and corporate taxes. For example,

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[2] The lease sales held under the 1953 Act involved tracts located primarily in the Gulf of Mexico off the coasts of Louisiana and Texas; some leases were sold on tracts off the coast of Southern California. More recent lease sales have included tracts in the "frontier areas", the Atlantic and offshore Alaska.

[3] Total OCS production currently provides about 12% of domestic oil production and 27% of domestic gas production (Pet 17 n.22).

[4] Bonus payments from 1954 through 1980 totalled approximately $30.7 billion.

[5] Production royalties from OCS leases totalled approximately $10 billion in the period 1954 through 1980. No profit share payments have been received to date.

in calendar year 1980, the federal treasury received approximately $6.2 billion in direct lease revenues.[6]

The 1953 OCS Lands Act required the leases to be sold on the basis of sealed bids, under either of two bidding systems: The Secretary of the Interior could, in his discretion, either establish a fixed royalty of not less than 12½% to be paid when the oil or gas was produced, and require bidding on the size of a cash bonus to be paid at the time of the lease award, or he could fix the cash bonus, and require bids on the size of the royalty (43 U.S.C. 1337(a)). Virtually all the tracts were leased prior to the 1978 Amendments on the basis of a cash bonus bid with a 16⅔% fixed royalty.

In reaction to a number of factors, including particularly increasing concerns over the national dependence on imported oil (H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 89 (1977); 43 U.S.C. (Supp. II) 1802), the 1953 Act was extensively revised by the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629. See 43 U.S.C. (Supp. II) 1331 *et seq.* The Amendments were designed to improve the management of the oil and gas resources of the OCS, and to that end provided for increased federal responsibilities and more specific mandates and guidelines for their implementation. A major focus of the Amendments was the requirement that the Secretary of the Interior develop a comprehensive leasing program by establishing a 5-year schedule of proposed lease sales, indicating the size, timing and location of OCS leasing activities. Before approving the leasing program, the Secretary of the Interior must submit it to specified federal and state

[6] This does not include the revenues from corporate income taxes or windfall profit taxes attributable to revenue from OCS leases.

officials and to Congress for comments. Once the program is approved, lease sales are held pursuant to it. Annual reports on the program must be submitted to Congress, along with any proposed amendments and extensions of the current program.

The 1978 Amendments also authorized the use of new bidding systems for the OCS lease sales. Section 205(a) of the 1978 Act, 43 U.S.C. (Supp. II) 1337(a)(1), amended Section 8(a)(1) of the 1953 Act to specify a variety of types of bidding systems. The amended Section 8(a) continues the 1953 Act's provision that the competitive bidding is to be "under regulations promulgated in advance." The Department of Energy Organization Act, 42 U.S.C. (Supp. II) 7152(b) and 7153, gives to the Secretary of Energy the authority to issue regulations implementing the OCS bidding systems, but requires that he consult with the Secretary of the Interior.

The specified types of systems include the traditional system—a cash bonus bid with a fixed royalty of not less than 12½% (Section 8(a)(1)(A)).[7] In addition, under the Act as amended, the Secretary may use other bidding systems with a cash bonus as the bid variable: the fixed component may be a share of net profits (Section 8(a)(1)(D)), or both a royalty and a net profit share (Section 8(a)(1)(F)), or a predetermined sliding scale royalty that varies depending on the amount or value produced (Section 8(a)(1)(C)). The amended Act also permits the use of bid variables other than a cash bonus: a royalty bid with (1) a fixed cash bonus, or (2) a

[7] The cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) is referred to in this brief as the traditional system. The other bidding systems identified in Section 8(a)(1)(B) through (H) are called the alternative systems.

fixed commitment to spend a specified dollar amount for exploration (a work commitment) or (3) both a cash bonus and a work commitment (Section 8(a)(1)(B)); a profit share bid with a fixed cash bonus (Section 8(a)(1)(E)); a work commitment bid with a fixed cash bonus and a fixed royalty (Section 8(a)(1)(G)); or a work commitment bid with a fixed cash bonus and a predetermined sliding scale royalty (Section 8(a)(1)(C)). Finally, the Secretary of Energy may develop any other bidding system, including a modification of the enumerated systems, so long as the new system has no more than one bid variable and is not disapproved by Congress (Section 8(a)(1)(H)).[8]

The amended Section 8(a)(1) provides, as did the 1953 Act, that the selection among the bidding systems is to be "at the discretion of the Secretary"; in the amended Act, Congress expressly defined the scope of that discretion by requiring that the Secretary of the Interior is to use systems other than the cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) in "not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year" under the five year plan. (Section 8(a)(5)(B)). The Secretary of the Interior need not, however, comply with this constraint on his discretion if he concludes that to do so is "inconsistent with the purposes and policies" of the Act—either because the traditional system should be used more or less frequently (*ibid.*). That conclu-

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[8] Under Section 8(a)(4)(A), 43 U.S.C. (Supp. II) 1337(a)(4)(A), the Secretary of Energy must submit any Section 8(a)(1)(H) system to the Congress; that system may then be used by the Secretary of the Interior unless either the House or the Senate has passed a resolution of disapproval within 30 days.

sion must be explained to Congress (Section 8(a)(9)(E)).

The Secretary of Energy is to consult with the Secretary of the Interior and submit an annual report to Congress, identifying the bidding systems that have not or will not be used, and explaining the reasons for the decision not to use them. Section 8(a)(9)(D), 43 U.S.C. (Supp. II) 1337(a)(9)(D). The Secretary of the Interior makes a similar report. 43 U.S.C. (Supp. II) 1343(2)(A).

2. As required by Section 18 of the amended Act, 43 U.S.C. (Supp. II) 1344, the Secretary of the Interior prepared and sent to Congress in April 1980 a five-year program for the period from June 1980 through May 1985.[9] The program provides for 36 sales; the first three were held in September, October and November of 1980, one was held in May 1981, and 6 more are scheduled for the balance of 1981. In each lease sale, a number of tracts are offered. The prospects for the discovery of substantial oil and gas resources, and the costs of the recovery of those resources, vary substantially from tract to tract.[10] For

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[9] The Secretary of the Interior has recently requested comments on a proposed revision of the leasing program, covering the period from January 1982 through December 1986. 46 Fed. Reg. 22468 (1981). The proposal contemplates area-wide lease offerings (7 planning areas off the contiguous 48 States and 15 off Alaska are identified), and an increase in the number of annual lease sales over the current plan. In seeking public comments on the appropriateness of various "streamlining proposals", the notice requests consideration of the question: "Which of the bidding systems authorized by the OCS Lands Act, as amended, would be most compatible with area-wide offerings?" (*id.* at 22473). The Secretary will consider comments received when he adopts a new five-year plan in June 1981 (*id.* at 22468).

[10] A recent study estimates that exploration and development costs on the OCS range from $98 million to $1.27 billion

that reason, the extent of bidder interest also varies widely from tract to tract.[11] In order to compare the results of the various systems, an effort is made to select comparable tracts for use of the alternative systems. The bidding systems other than the one identified in Section 8(a)(1)(A) have been used in 49% of the total area offered for leasing since September 1978.[12]

The Secretary of Energy has issued several bidding system regulations.[13] Final regulations for the cash bonus bid-fixed royalty bidding system described in Section 8(a)(1)(A) were promulgated on Feb. 5, 1980 (45 Fed. Reg. 9536). At the same time, the Secretary issued regulations for the royalty bid-fixed cash bonus bidding system described in Section 8(a)(1)(B) and a cash bonus bid-fixed sliding scale royalty bidding system, one of the alternatives de-

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per tract in 1979 dollars. (Cabot Consulting Group, *Competition on the Outer Continental Shelf and Its Implications for Competition in Downstream Markets*, DOE Contract No. DE-AC01-79RA35011, Table 3-1, at 23 (July 14, 1980)).

[11] This variation is reflected in the difference in the size of the bonus bids on the tracts in the FY 1979 lease sales, which ranged from $100 thousand to $153 million under one bidding system (cash bonus bid-fixed royalty) and from $81 thousand to $143 million under the other (cash bonus bid-sliding scale royalty). Summary of Recap of Bids for OCS Lease Sale 49, 58 & BF.

[12] The alternative bidding systems used were a cash bonus bid fixed profit share bidding system, and a cash bonus bid-fixed sliding scale royalty bidding system.

[13] While these regulations were being promulgated, the Secretary of the Interior continued to hold lease sales and issue leases under the system authorized in the original 1953 Act, as Congress intended. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138 (1977).

scribed in Section 8(a)(1)(C) (45 Fed. Reg. 9536 (1980)). A few months later, he promulgated final regulations for a cash bonus bid-fixed net profit share bidding system, as described in Section 8(a)(1)(D) (45 Fed. Reg. 36784 (1980)). On remand to the district court from the instant judgment, the parties stipulated to the entry of an order requiring the Department of Energy to issue final regulations for a net profit share bid-fixed cash bonus bidding system (as described in Section 8(a)(1)(E)) by May 25, 1981, and for a work commitment bid-fixed cash bonus and fixed royalty bidding system (as described in Section 8(a)(1)(G)) by June 30, 1981. The final net profit share bid regulation was accordingly issued on May 22, 1981 (46 Fed. Reg. 29680 (1981)), and the Secretary plans to issue the final work commitment bid regulation by June 30.[14] Regulations have not been proposed for the bidding systems authorized by Section 8(a)(1)(F)—cash bonus bid with a fixed royalty and a fixed net profit share—or for the additional systems authorized by Section 8(a)(1)(C) and (B)—the work commitment bid-fixed cash bonus and fixed sliding scale bidding system, and the royalty bid-fixed work commitment bidding system. No novel bidding systems of the kind authorized by Section 8(a)(1)(H) have been proposed.[15]

3. Respondents' complaint, filed June 22, 1979, alleged that the continued use of the Section 8(a)(1)

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[14] Proposed work commitment regulations were issued on March 30, 1981 (46 Fed. Reg. 20522 (1981)).

[15] A Notice of Inquiry published July 25, 1980 (45 Fed. Reg. 49586) requested comments on possible Section 8(a)(1)(H) bidding systems utilizing a work commitment component.

(A) cash bonus bid-fixed royalty bidding system did not promote adequate competition or obtain a fair return for the interests leased (App. 19, 39-44, 49-59).[16] Respondents charged that the continued use of this system by the Secretary of the Interior, and the fact that the Secretary of Energy had not promulgated regulations implementing alternative bidding systems, violated the OCS Lands Act, as amended (App. 19, 89-92). Claiming standing as consumers of oil and gas, as taxpayers, and as competing lessors of offshore oil and gas properties (App. 19-23, 86-88), respondents sought declaratory and injunctive relief prohibiting (1) further lease sales until alternative bidding system regulations were promulgated, and (2) further lease sales using "cash bonus, low-royalty bidding systems" (App. 20, 92, 96).[17]

On June 25, 1979, four days before the scheduled opening of bids at Lease Sale 48, respondents filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems mandated by the Outer Continental Shelf Lands Act" (J.A. 129).[18] After a hearing, the district court de-

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[16] The complaint objected to the continued use of the "cash bonus, low-royalty system" (see, *e.g.*, App. 39 *et seq.*, 93 *et seq.*), which apparently meant only the cash bonus system using the 16 2/3% fixed royalty (see, *e.g.*, App. 50, 81, 96). The complaint identified as a desirable alternative the cash bonus bid-sliding scale royalty system (App. 54).

[17] Respondents also sought an order requiring defendants to review all past leases to determine whether their issuance and continuance was consistent with the OCS Lands Act, and, if not, to take corrective action (App. 100). They have abandoned this claim, and it was dismissed on May 7, 1981.

[18] In opposing the preliminary injunction, the government noted respondents' lack of standing (J.A. 174, 192-194).

nied that motion, ruling that respondents had not shown a likelihood of prevailing on the merits (App. 192-193), and that the pace at which defendants were issuing bidding system regulations was not arbitrary and capricious, "in light of the complexity and sensitivity involved in preparation of such reglations" (App. 193).

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed, noting that the 1978 Amendments continued to authorize the use of the cash bonus bid-fixed royalty bidding system, as well as others (Pet. App. 86a). Emphasizing that the selection of bidding systems for use in lease sales was to be at the discretion of the Secretary of the Interior, the court recognized that discretion was "limited in one crucial respect," by the requirement of Section 8(a)(5)(B) that the cash bonus bid-fixed royalty bidding system was to be used in at least 40%, but not more than 80%, of the lease offerings in the first five years (*id.* at 86a-87a). The challenged offerings "fall well within the [required] percentages," since 50% were offered under the cash bonus bid-fixed royalty bidding system and 50% under a cash bonus bid-fixed sliding scale royalty bidding system (Pet. App. 88a; see Section 8(a)(1)(C)). The court of appeals also agreed with the district court's conclusion that the rate at which the bidding system regulations were being promulgated was not unreasonable (Pet. App. 88a-92a).[19]

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[19] The court of appeals also rejected respondents' primary contention at that stage of the litigation, which focused on the clause in Section 8(a)(5)(B) permitting the Secretary of the Interior to avoid the percentage requirements if he determines that they are inconsistent with the Act's purposes and policies. Respondents argued that the cash bonus bid-fixed royalty bidding system was so disadvantageous to the

After affirming the denial of the preliminary injunction, the court of appeals remanded the case for further proceedings. Both parties thereupon moved for summary judgment,[20] and respondents again sought a preliminary injunction to prevent future lease sales until additional bidding system regulations had been issued. On September 17, 1980, the district court denied all motions (Pet. App. 60a-61a, 74a). Respondents appealed from the denial of their second motion for preliminary injunction, and after expedited consideration (see 43 U.S.C. (Supp. II) 1349(d)), the court of appeals on September 29, 1980, affirmed the district court's action to the extent that it permitted the lease sales scheduled for September, October and November 1980 (Pet. App. 2a-3a & n.5). Thereafter, and without briefing on the merits, the court entered the judgment that is the subject of our petition, and an opinion that not only explains the basis for the affirmance of the refusal to enjoin the pending 1980 sales (Pet. App. 47a-48a), but also rules on "the basic statutory issue dominating this protracted litigation" (Pet. App. 23a), concluding that the Secretary of the Interior is required to utilize at least some bidding systems in which the cash bonus is not the bidding variable,[21] and

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government that the Secretary's failure to determine that it should not be used at all was an abuse of discretion. The court of appeals disagreed (Pet. App. 92a-96a), and that contention is not urged here.

[20] The government's motion was based in part on respondents' lack of standing. Statement of Points And Authorities In Support of Defendant's Cross-Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Partial Summary Judgment, Or In The Alternative, For Preliminary Injunction, at 10-15 (filed June 23, 1980).

[21] The extent of the Secretary of the Interior's obligation under the court of appeals' opinion to experiment with the

that the Secretary of Energy must issue the appropriate bidding system regulations.[22] The opinion accordingly directs that the district court, on remand, "should insure that, to the maximum extent feasible, regulations for the two non-cash bonus variable bidding options set out in section 8(a)(1)(E) and (G) are promulgated before further lease sales take place in 1981" (Pet. App. 50a).

In a final footnote, the court of appeals found standing in the respondents as consumers and as competitors.[23] The court found that the California governmental respondents had alleged a "concrete and tangible" economic injury (Pet. App. 52a n.*)[24] and that the consumer respondents had alleged

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alternative systems is unclear. Compare Pet. App. 38a, 40a-41a, 49a (obligation to test all) with 29a, 31a, 38a, 48a n.96, 49a (semble) (obligation to test non-cash bonus alternatives) and 38a, 41a-46a, 74a (obligation to test variable net profit share). See also Pet. App. 47a n.95.

[22] Parts of the opinion also suggest that the Secretary of Energy has an obligation to promulgate regulations covering each of the bidding systems specified in B through G (Pet. App. 35a, 38a).

[23] Respondents also asserted standing as taxpayers and citizens, on the theory that the bidding injured them because the federal treasury did not receive enough money for the resources (App. 87-88).

[24] The California State Lands Commission and the City of Long Beach alleged that their ability to lease their undeveloped oil and gas lands was threatened by the federal leasing project's "generous" terms (App. 88). They also claimed, in a letter filed as an appendix to their complaint (App. 122), that they were harmed in "drainage" situations: where a pool of oil or gas crosses the line separating state ownership from federal ownership. In such a situation, they claimed that they would receive insufficient payment for their

sufficient economic harm to have standing on that basis (*id.* at 52a-53a n*).[25]

SUMMARY OF ARGUMENT

I

Respondents lack standing to sue, because there is an insufficient relationship between the federal actions they challenge and their interests, either as consumers of oil and gas or as competitors in leasing oil and gas rights in submerged lands. Their assertions—that the failure to promulgate bidding system regulations and to use those systems in actual lease sales cause private companies to act in ways that raise the price of oil and gas and render it impossible for the states to obtain adequate revenues for their submerged land offerings—are the sort of tenuous and speculative claims of injury that this Court has repeatedly held to be insufficient to meet the "case or controversy" requirement of Article III of the Constitution. Even if the constitutional requirement is met, the usual prudential limitations on standing apply with particular force in the context of this Act, which was amended in 1978 to permit the expeditious development of the OCS. Nothing in the "citizen suit" provision (43 U.S.C. (Supp. II) 1349

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share of pooled resources because of the low payments received by the federal government under its leases. No specific drainage situation, however, was identified.

[25] As consumers, respondents claimed that they were harmed because only large businesses could afford bidding systems using large cash bonuses and as a result there was less competition under those systems; the decreased competition, they reasoned, caused them to pay more for gas and oil they consumed than they would otherwise have to pay (App. 86-87).

(a)(1)) suggests that Congress intended to authorize the serious impediment to orderly lease sales that would result from permitting suits by persons with only the attenuated interests of these respondents.

II

In any event, neither the language of the OCS Lands Act nor its legislative history show an intent by Congress to require experimentation with any specific one of the alternative systems set out in Section 8(a)(1)(B) through (H) of that Act. The wording of the Act is clear: it requires the use of the traditional cash bonus bid-fixed royalty share bidding system in 40 to 80% of lease sales, but leaves the choice of which alternative systems to utilize in the remaining sales to the discretion of the Secretary of the Interior. Nor does the statutory language, in terms or by implication, require the Secretary of Energy to promulgate regulations for any bidding systems that would not further the purposes of the Act. Absent exceptional circumstances, not present here, there is no reason to look beyond the unambiguous language of the statute to the legislative history. If the legislative history is examined, however, it shows that Congress distinguished only between the traditional cash bonus bid-fixed royalty system identified in Section 8(a)(1)(A) and the various alternatives to that system, several of which also include a cash bonus bid as the bid variable. The question whether the Secretary of the Interior should be precluded from relying entirely on the traditional bidding system was extensively debated; the Act reflects the resolution of that debate in the 40 to 80% requirement. There was, however, no intent to prescribe the details of the experimentation required, or to impose an inflexible requirement that

each system, or any particular type of system, be tested in actual lease sales, even if the Secretary had concluded that it would disserve the statutory purposes to do so. Instead, the legislative history reflects the expectation that the Secretary of the Interior would use his discretion in determining when and where to make use of alternative systems, and provides criteria to guide the exercise of that discretion.

ARGUMENT

I. THE RESPONDENTS LACK STANDING TO SUE

a. This Court has held that in order to have standing to sue, plaintiffs must allege a "distinct and palpable injury." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). They must also show that there is a "fairly traceable" causal connection between the claimed injury and the challenged conduct, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), so that if the relief sought is granted, the injury will be redressed. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45 (1976). Moreover, while a person indirectly injured by governmental activity that directly affects only a third party may have standing to challenge that activity, the indirectness of the injury "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth* v. *Seldin*, *supra*, 422 U.S. at 505.

Respondents here have not met those requirements. The complaint alleges three bases for standing: as consumers of oil and gas, as federal taxpayers, and as owners of off-shore property that could be leased in competition with the OCS. As consumers, respond-

ents contend that experimentation with non-cash bonus bidding systems is likely to demonstrate that those systems increase competition, attracting firms that are more likely to explore and produce petroleum more cheaply than the firms that obtain the leases under the cash bonus bid systems.[26] As competitors, they assert that the cash bonus bid systems are so favorable to bidders that they are not interested in bidding on respondents' properties under systems that assure a higher return to respondents, and that respondents cannot receive a fair return in "drainage" situations where the pool underlies both federal and state lands.[27]

These assertions are typical of the highly speculative claims that this Court has consistently rejected as bases for standing, demanding "something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U.S. 669, 688 (1973).

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[26] Respondents' claim of standing as taxpayers was not pressed in the district court nor passed on by the court of appeals (see Pet. App. 53 n.*). The claim rests on the assertion that use of the alternative systems will result in greater returns to the Treasury than the systems now utilized. It is thus subject to speculative uncertainties similar to those discussed *infra* in regard to consumer claims. There is an insufficient logical nexus between respondents' status as taxpayers and the challenge to the bidding systems used in OCS leases. Cf. *Flast* v. *Cohen*, 392 U.S. 83, 101-102 (1968). See also App., *infra*, 1a-5a.

[27] Respondents' claims as consumers and as competitors are significantly inconsistent: As competitors, state respondents contend they would benefit because under the alternative bidding systems, fewer bidders would be interested in federal leases and more in any leases they might choose to offer. But the consumer respondents argue that the use of those same alternative systems will *increase* the number of bidders interested in federal leases.

Thus, respondents' claim that alternative systems are likely to attract more efficient producers, ultimately resulting in lower consumer prices, is at least as speculative as the assertion in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), that the alteration in an IRS ruling would encourage hospitals to offer services to indigents; or the claim in *Warth* v. *Seldin*, 422 U.S. 490 (1975), that an alteration in zoning regulations would enable the petitioners to construct and occupy moderately priced housing; or the assertion in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), that application of criminal sanctions against non-support to fathers of illegitimate children would result in payments by the father of petitioner's child. Here, as in those cases, the alleged injury results from the independent actions of third parties not before the court, not from the actions of defendants, and the claim that the judicial relief sought will redress the claimed injury is simply too speculative to confer standing. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 41-42.

Indeed, the assertion that increased participation in bidding will result in more efficient exploration and production, and ultimately in lower consumer prices, overlooks the realities of the leasing process, this country's dependence on foreign oil, and the structure of the world oil market. First, the extent of competition for a particular lease depends far more on the estimates of the resources and the costs of development of the tract covered by the lease than on the bidding system involved.[28] Second, the

[28] Competition is primarily limited by the intractable economics of the endeavor. Because development costs for a single tract may exceed $1 billion, OCS leases are of interest only to firms, or combinations of firms, that can finance large capital projects. In reaction to this problem, small companies

effects of exploration and production efficiencies on the OCS on the ultimate cost of oil and gas to consumers is negligible. Consumer prices are the result of many factors in addition to the price of crude oil including the costs of refining, transportation and marketing. And, even assuming that increased competition for OCS oil and gas leases might result in exploration and production efficiencies that would, in a free market, cause perceptible crude oil price reductions, oil and gas prices are not freely determined in a competitive market, but reflect the dominance of a world-wide cartel. So long as that cartel continues to dominate the world oil market and the United States continues to import substantial portions of its oil supply, domestic oil prices will be unaffected by any increased efficiency in OCS operations—or by any other effect of the hoped for increased competition for OCS leases. Indeed, respondents have not spelled out in any detail the relation between their interests as consumers and an increase in competition for OCS leases.[29]

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may join others in bidding combines, taking partial interests in a number of tracts. *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on H.R. 1614 Before the House Ad Hoc Select Comm. on OCS*, 95th Cong., 1st Sess., Pt. 2, 1526 (1977) (hereinafter cited as "*House Hearings*").

[29] Respondents' suggestion that reliance on the traditional Section 8(a)(1)(A) system decreases the amount of oil and gas available by encouraging the large oil companies to "stockpile" rather than develop their leases, is also speculative. In any event, high cash bonus bids have precisely the opposite tendency. High lease acquisition costs encourage prompt exploration and development in order either to recoup the bonus through production revenue or to maximize the benefit of the tax write off of the bonus if no resources are discovered. The lower acquisition costs and higher contingency costs of the alternative systems offer greater incentives to "stockpiling". See App., *infra*, 1a-5a.

In sum, the relation between the bidding systems utilized in OCS leasing and the ultimate prices paid by consumers is far less direct than the consumer standing recognized in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 335 (1979), where it was alleged by a hearing-aid purchaser that a variety of antitrust violations, including vertical and horizontal price fixing, by the manufacturers of hearing aids had led to inflated consumer prices.[30]

The bare allegation of the two California governmental entities that they would obtain better returns on their offshore oil and gas properties if the federal government altered its OCS leasing policies is similarly speculative. The state has announced no plans to issue oil and gas leases for its offshore properties, let alone made any showing that if it did so, the OCS lease terms would be reasonably likely to affect industry interest in leasing state properties.[31]

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[30] The other cases on which the court below relied in finding consumer standing are even less relevant, since they involve challenges by consumer groups to regulatory agency actions permitting price increases to oil and gas producers. *Consumers Union of United States, Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975); *Consumer Federation of America* v. *FPC*, 515 F.2d 347 (D.C. Cir. 1975); *Consumers Union of United States, Inc.* v. *FPC*, 510 F.2d 656 (D.C. Cir. 1974). Plaintiffs' standing was apparently not challenged in those cases, and, in any event, the relation of the producers' price increases to the consumers' costs was clear and direct.

[31] In order to make such a showing, it would have to appear that state and federal lease sales would be in competition with each other—that there is a fixed demand for leases that is nearly satisfied by the federal offerings, so that more bidding on federal leases would result in less bidding on state ones. It would also have to be shown that the properties offered under the two systems would be similar enough (in terms of their potential for containing recoverable quantities of oil

Respondents' situation here is thus not like that of the petitioner granted standing as a competitor in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970), who could point to specific customers lost as a direct result of the agency action there challenged. Instead, this case resembles *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978), in which allegations of general competitive disadvantage were insufficient to show standing to challenge a tax preference given to a competitor.

Nor does the possibility that the governmental respondents might be affected by a "drainage" situation suffice as a basis for standing. Nothing in the record suggests that, if the relief respondents seek were granted, the Secretary of the Interior would be required to use a non-cash bonus bid bidding system for any tract over a pool that also lies under state property. Respondents have accordingly not shown that the relief requested would redress any injury they might suffer in a drainage situation. Indeed, the statute suggests that respondents' claims of the potential for injury in the drainage situation may be overstated. Section 8(g)(2) of the Act, as amended, 43 U.S.C. (Supp. II) 1337(g)(2), provides for agreements between the state and federal governments for the "fair and equitable" division of the proceeds when the federal government leases tracts overlying a common pool. Such an agreement is specifically designed to insulate a state from any possible harm due to the government leasing.

Respondents' bare allegations of injury are also in sharp contrast to the factual findings, based on four

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and gas and the costs of that recovery) so that differences in the leasing systems would make a significant difference in the attractiveness of the leases offered under the two systems.

days of testimony, on which this Court relied in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). Those factual findings—that appellees would be exposed to immediate adverse effects from the construction of the proposed nuclear plant, and that in the absence of the challenged statute, the plant would not be constructed—were not clearly erroneous, and satisfied the requirement of a "fairly traceable" causal connection between the claimed injury and the remedy sought. There are no similar findings here.[32]

b. This Court recognized in *Warth* v. *Seldin*, *supra*, 422 U.S. at 514, that, if the minimal constitutional "case-or-controversy" requirements of Article III are met, Congress can create a statutory right to sue in persons who, without the statute, would have had no standing. See also *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972). In light of the precedent discussed above, we contend that the re-

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[32] The Court in *United States* v. *SCRAP*, *supra*, 412 U.S. at 686-690, found standing based on an allegation that a general freight rate increase would discourage the use of recyclable goods, thus requiring the use of more natural resources and adversely affecting the environment in which plaintiffs lived. Although the Court characterized this line of causation as "attenuated" (*id.* at 688), it is substantially more direct than the chain of causation relied on by respondents here. Moreover, the issue in SCRAP was simply whether the complainants' allegations of standing were sufficient to withstand a motion to dismiss. As the Court noted in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 45 n.25, and as the SCRAP Court itself emphasized (412 U.S. at 689-690), those claims might not have survived a motion to dismiss supported by affidavits challenging the accuracy of the allegations. There was such a motion here, and the Heintz affidavits contain the necessary showing of the inaccuracy of the respondents' allegations concerning the performance of the bidding systems in question (App. 174, 266).

spondents have not satisfied the Article III standing requirements. If this Court should disagree, it would then be appropriate to consider whether respondents have a statutory right to sue by virtue of 43 U.S.C. (Supp. II) 1349(a)(1), the "citizen suit" provision of the 1978 Amendments. That Section provides in relevant part that "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States." Because the statute permits suit only by those having "a valid legal interest," it does not help respondents.[33] The legislative history of the section confirms that it was not designed to expand the standing of those alleging attenuated economic interests. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 161 (1977), emphasizes that the interest asserted "must be discernible and ascertainable." The purpose was simply to assure standing to those with a "definable aesthetic or environmental interest," as well as those with the traditional economic interest.[34] As we have shown, respondents have no

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[33] The typical citizen suit provision in resource protection statutes contains no such limitation. See, *e.g.*, 16 U.S.C. 1540(g) (Endangered Species Act of 1973); 42 U.S.C. 1857h-2 (Clean Air Act); 33 U.S.C. 1415(g) (Ocean Dumping Act).

[34] The reports of the Oversight Committee on which the court below relied confirm this reading. H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 22 (1979), explained the new provision as providing for "expedited judicial review"; it did not suggest any expansion in the standing accorded to those with economic interests. Similarly, H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 18-19 (1980), explains that the section is designed to "promote unitary court actions," and strongly suggests that any expansion in the scope of standing was limited to assuring that those who have definable aesthetic or environmental interests at stake are given equal status with those asserting traditional economic interests.

discernible or ascertainable economic interest in the bidding systems utilized in OCS leasing, nor do they allege any aesthetic or environmental interests that may be affected by the Secretaries' actions. They accordingly have no standing based on 43 U.S.C. (Supp. II) 1349(a)(1).

The usual prudential limitations on standing apply with particular force in the context of the OCS leasing program established by the 1978 Amendments. As more fully explained in the amicus brief of *Atlantic Richfield Co.*, a major purpose of those Amendments was to eliminate delays in the leasing of OCS mineral rights; the conclusion that respondents have standing as consumers is inconsistent with that purpose. If status as a consumer of oil and gas products is sufficient to show standing in this case, virtually any citizen who disagrees with any aspect of federal leasing policies will have standing to challenge them in court, thus greatly increasing the potential for delays in implementing the program, in direct opposition to the congressional purpose. Cf. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220 (1974); *Western Mining Council* v. *Watt*, 643 F.2d 618, 623-624 (9th Cir. 1981).

This is not a situation in which the denial of standing to these respondents will insulate the Secretaries' activities from judicial review entirely. If, as respondents claim, the bidding policies place an improper burden on the ability of smaller firms to compete for OCS leases, those firms would clearly have standing to challenge those policies. They have neither joined in respondents' suit nor raised similar challenges themselves. In fact, respondents' enthusiasm for the non-cash bonus bidding systems is apparently not shared by those firms. At the hearings on the Amendments to the OCS Lands Act, a representative of the Domestic Petroleum Council, an

association of 21 medium to small independent oil companies, testified that the cash bonus bid-fixed royalty bidding system did not inhibit competition by those firms, and that they were "more than content with" that system. *House Hearings* 1492, 1525-1526; *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 276, 290-291 (1977). See also 46 Fed. Reg. 29682 (1981).

II. THERE IS NO OBLIGATION UNDER THE ACT TO PROMULGATE REGULATIONS FOR, OR TO EXPERIMENT WITH, ANY PARTICULAR ALTERNATIVE BIDDING SYSTEM

A. The Statutory Language is Unambiguous

The OCS Lands Act, as amended, contains an unusually precise specification of the obligation to experiment with bidding systems other than the one defined in Section 8(a)(1)(A). Neither the court below nor the opposition to the petition for certiorari has suggested any way in which that clear statutory language can be reconciled with the conclusion of the court below that the Secretary of Energy must promulgate regulations for, and the Secretary of the Interior must utilize, bidding systems even if they determine that their utilization will not be consistent with the purposes of the Act.[35] Although we do not

[35] In their opposition, respondents urge that the bidding systems they prefer are more likely to achieve the statutory purposes than the ones utilized to date (Br. in Opp. 23-25). It is beyond dispute, however, that the determination of which bidding systems are most likely to serve the various statutory policies is precisely the kind of complex technical question that must be left to expert administrative determination under the Act. Neither the respondents nor the courts have any statutory authority to substitute their judgment about such matters for that of the administrative agencies. See,

believe that the legislative history upon which the court below and respondents rely supports their interpretation of it, our principal reliance is on the plain language of the statute. This case presents no "'rare and exceptional circumstances'" justifying further inquiry, because here, as in *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 6 (collecting cases), the unambiguous statutory language is entirely consistent with the history and purposes of the Act, as well as with customary legislative practices in providing for management of the federal domain.[36]

Section 8(a)(1) of the Act (43 U.S.C. (Supp. II) 1337(a)(1)) authorizes the Secretary of the Interior, to use his discretion in selecting the bidding systems for use in lease sales. That Section provides that "[t]he bidding shall be at the discretion of the Secretary, on the basis of [the specified systems]." That discretion is not unlimited. The precise extent of the statutory mandate to use the various bidding systems is spelled out in Section 8(a)(5)(B): Alternatives to the system specified in Subsection 8(a)(1)(A)—the cash bonus bid-fixed royalty bidding system—must be used in not less than 20% and not more than 60% of each year's lease sales for five years from the enactment of the 1978 Amendments, unless the Secretary determines that those percentage requirements

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e.g., *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978).

[36] In the absence of specific statutory limitations on the Secretary of the Interior's authority (as, for example, in the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*), he retains broad discretion in administering the public lands. *See, e.g., Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 (1963); *United States* v. *Wilbur*, 283 U.S. 414, 419 (1931).

are inconsistent with the purposes and policies of the Act. There is simply no room in this precisely defined legislative mandate for any implication that the Secretary must utilize any specific system other than that identified in Section 8(a)(1)(A). In light of the "escape hatch" provision (see H.R. Rep. No. 95-590, *supra*, at 139), permitting the Secretary of the Interior to alter the established percentage requirements if he determines that they are inconsistent with the statutory purposes, it is particularly inappropriate to read into the Act a rigid requirement for experimentation with a particular system if the Secretary of the Interior has determined, after consultation with the Secretary of Energy, that use of the system will disserve the statutory purposes.

If the language of Section 8(a)(5)(B) left any room for doubt about the Secretary of the Interior's discretion to select only those alternative systems that he concludes are likely to further the statutory purposes, that doubt is dispelled by the reporting requirements of the Act, which recognize the possibility that some of the specified bidding systems will not be used, and require the Secretaries to report the reasons for that non-use to the Congress (43 U.S.C. (Supp. II) 1337(a)(9) and 1343(2)(A)).

The statute thus identifies a variety of bidding systems, directs the Secretary of the Interior to use the one defined in Section 8(a)(1)(A), and to select from among the alternative systems for leasing between 20% and 60% of OCS lands in the first five years of the Act unless he determines that the statutory purposes would not be served by such experimentation; it also requires reports on the reasons any system has not been selected. This statutory scheme implements the congressional desire for experimentation with alternative systems, but avoids tying the Secretary's hands with rigid requirements that can

only hinder the effort to develop the best possible bidding systems.[37]

Although the Secretary of Energy's responsibilities for promulgating regulations for the use of the alternative systems are not spelled out in similar statutory detail, there is not the slightest indication that he must promulgate regulations in the absence of any likelihood that they will be used.[38]

Under the 1953 OCS Lands Act, the Secretary of the Interior was responsible for issuing the bidding system regulations, as well as using them (43 U.S.C. 1334(a)(1), 1337(a)). The Department of Energy Organization Act transferred the responsibility for the promulgation of the OCS bidding system regulations to the Secretary of Energy (42 U.S.C. (Supp. II) 7152(b)). The 1978 Amendments to the OCS

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[37] The congressional interest in assuring the Secretary's flexibility to determine the bidding systems with which he will experiment, while maintaining close congressional scrutiny of the exercise of that flexibility, is further demonstrated by the reporting requirements and Section 8(a)(1)(H). After identifying a variety of types of bidding systems in Section 8(a)(1)(A)-(G), Congress included a catch-all provision, permitting the administrative development of still further variations of the identified systems—or the development of entirely novel systems—so long as the new systems were submitted to Congress.

[38] Neither the court below nor respondents allege that such an independent duty exists. Instead, they base their argument that the Secretary of Energy must issue regulations on the asserted obligation of the Secretary of the Interior to use them. It is, nevertheless, conceivable that the Secretary of Energy could be required to promulgate regulations which would be available to the Secretary of the Interior if he should then decide to use the alternative system described. The discussion above shows that this conceivable statutory scheme was not the one selected by Congress.

Lands Act confirmed the transfer (43 U.S.C. (Supp. II) 1331(b)), and required close cooperation between the two Departments in developing the regulations (42 U.S.C. (Supp. II) 7153(b)). If the responsibility for development and use of the regulations had remained with the Secretary of the Interior, it could scarcely be argued that he was required to develop regulations he did not intend to use. There is nothing in the separation of the responsibilities that suggests Congress intended, purely by implication, to impose such a requirement. Indeed, the cooperation requirement strongly suggests otherwise—instead of the Secretary of Energy working independently to present a full array of regulations to the Secretary of the Interior for his selection of those he preferred to utilize, the two were to cooperate from the beginning to assure that the eventual product was consistent with the purposes of the statute.[39] By requiring cooperation, Congress avoided the wasteful expenditure of administrative resources that would be involved in the promulgation of a full array of regulations before the Secretary of the Interior made his selections.

In the OCS Lands Act, when Congress intended to require the promulgation of regulations, plans, or procedures, it did so specifically. (See, *e.g.*, 43 U.S.C. (Supp. II) 1334(a), 1344(a)-(f), 1337(a)(6) and (9), 1343). In that context, the bare requirement that lease sales be conducted "under regulations promulgated in advance" (43 U.S.C. (Supp. II) 1337

[39] The closeness of the intended working relationship between the two agencies is also evidenced by the requirement that the Secretary of the Interior obtain the Secretary of Energy's approval for proposed lease terms and conditions (42 U.S.C. (Supp. II) 7153(c)(1)).

(a)(1)) cannot reasonably be read as sufficient to impose on the Secretary of Energy the obligation to promulgate an entire range of bidding system regulations.[40]

It is equally clear that Congress did not, in the 1978 Amendments, require the Secretary of the Interior to experiment either with non-cash bonus bidding systems, as the court below appeared to believe[41] or with a variable net profit share bidding system, as respondents argue (Br. in Opp. 23-25). Nothing in the statute limits the Secretary's discretion in selecting among the alternatives to the cash bonus bid-fixed royalty bidding system described in Section 8(a)(1)(A). Instead, three of the specifically described alternatives employ the cash bonus as the bid variable (Subsections (C), (D), and (F)), and nothing in Subsection (H) precludes the use of a cash bonus bid variable in a novel system or a variation on the

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[40] A requirement that regulations must be developed for all the specified systems is also inconsistent with the way in which the alternatives are identified in the statute—they are specified as examples of generic types of systems, rather than as definitive descriptions, leaving to the Secretary of Energy only the responsibility for filling in the details by regulation. For example, the Secretary could scarcely issue regulations that implement all the various alternatives possible under Subsection (C) or (G). And, of course, the final catch-all provision, Subsection (H), permitting the development of an unlimited number of novel systems or variations on the previous alternatives, is flatly inconsistent with any *requirement* that it be implemented by regulation. That inconsistency strongly suggests there is no such requirement for the parallel provisions of Section 8(a)(1).

[41] As we pointed out *supra*, note 21, it is difficult to determine precisely what the court below read the statute to require.

described alternatives. Moreover, in describing the limitations on the Secretary of the Interior's discretion in Section 8(a)(5)(B), Congress did not single out the non-cash bonus bid systems, either singly or as a group, as necessary subjects of experimentation. Congress evidently did not intend to channel the Secretary's discretion in choosing among the alternatives, or to draw any contrast between cash bonus bid systems and those using other bidding variables.[42] The only contrast was between the cash bonus bid-fixed royalty bidding system and all the others.[43]

B. The Legislative History Confirms the Clear Meaning of the Statutory Language

Respondents and the court below misconstrue the legislative history. They focus on separate but related themes that recur throughout the legislative histroy of the 1978 Amendments: dissatisfaction with "bonus bidding" or the "cash bonus system," particularly because of the requirement of large front end payments that was seen as inhibiting competition for leases, and a determination to require experimentation with alternative bidding systems. But a careful reading of the legislative history discloses

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[42] The fact that Congress did not draw any sharp distinction between bidding systems using a cash bonus bid and those using other bidding variables is demonstrated by the inclusion in Subsection (C), describing sliding scale royalty bidding systems, of both cash bonus bid and work commitment bid variations.

[43] Reading the statute to require the utilization of *all* the alternative systems would be subject to the same objections as requiring promulgation of regulations for all the alternatives. See, *supra*, note 40.

that general references to "bonus bidding" and the "cash bonus system" are used as shortened descriptions of the Section 8(a)(1)(A) cash bonus-fixed royalty system that had been used in almost all lease sales when the Amendments were being considered. It was that system, particularly when the fixed royalty was 16⅔%, that resulted in high front end payments, and it was alternatives to that system that were to be tested.[44]

Two statements from the legislative history relied on by the court of appeals (Pet. App. 31a, 29a) suffice to demonstrate the point.[45] In paraphrasing the requirements of Section 8(a)(5)(B), the Conference Report, H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 92 (1978), states:

> Bidding systems other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems, are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in *all* OCS areas during each of the next 5 years. [Emphasis in original.]

Unless the reference to "bonus bidding" refers only to the traditional system described in Section 8(a)(1)(A), the summary is simply wrong: as explained above, Section 8(a)(5)(B) requires the use

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[44] The Report of the 1980 Oversight Hearings confirms this interpretation, recognizing that "alternative bidding systems such as the sliding scale royalty system have * * * met the OCSLAA requirement for the use of alternative bidding systems." H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 49 (1980). The sliding scale royalty system utilizes a bonus bid.

[45] Other examples may be found in H.R. Conf. Rep. No. 95-1474, *supra*, at 90, and in H.R. Rep. No. 95-590, *supra*, at 47, 54, 135, 140 n.50, 210.

of alternatives to the system specified in Section 8(a)(1)(A), but three of the enumerated alternative systems also involve bonus bidding, albeit with different forms of contingency payments. Similarly, the statement in the House Committee Report (H.R. Rep. No. 95-590, *supra*, at 139) that "[i]t was the intention of the committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid" follows a discussion of the testimony concerning the traditional cash bonus bidding system, and the resolution of the disagreements over its desirability in the provision of the alternative systems. In context, it is clear that the reference to "the cash bonus bid" is to the system described in Section 8(a)(1)(A) only.[46]

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[46] The full quotation is as follows (H.R. Rep. No. 95-590, *supra*, at 138-139):

Mandated use of new bidding systems

Under existing law the Secretary is permitted to offer oil and gas leases on the basis of either (1) a cash bonus bid with a royalty fixed at no less than 12½ percent of the gross revenue from the lease, or (2) on the basis of a royalty rate bid with a fixed cash bonus. Since the OCS Lands Act was approved in 1953, virtually all OCS leases have been offered for cash bonus bids with a royalty rate fixed at 16 2/3 [percent] of the gross value of production.

The Department of the Interior held a small scale test of royalty bidding in September 1974.

Witnesses before the committee indicated that the high front-end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters, to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

Others, including representatives from some of the larger oil companies, indicated their satisfaction with the present front-end bonus system in that it provides

Dissatisfaction with large front end payments was a substantial basis for requiring experimentation with

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for rapid exploration and recovery of resources and has worked so as to provide maximum revenue with no risk to Government, and with ample opportunity for all to participate.

As indicated earlier, the 1977 amendments authorizes new bidding options. The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that arrangements can be effective in shifting new Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas.

In order to assure that these new bidding alternatives are used, the 1977 amendments limit the Secretary's authority to use the cash bonus—fixed royalty system, which has been the historical method of OCS bidding. The Secretary would have to use one of the new bidding systems in at least 50 percent of the total area offered for lease each year during the next 5 years, in frontier areas. However, if during the first year after enactment, the Secretary finds that compliance with this limitation would unduly delay OCS development, he may exceed the limit after reporting to Congress his findings and reasons. After the first year, the Secretary can only exceed the limitation if he demonstrates to Congress, in a report with specific findings and detailed reasons, that using new systems in 50 percent of the lease area offered would unduly delay efficient development, result in less than a fair return to the Federal Government, or result in a reduction of competition. Congress would have thirty (30) days to review the report and could dis-

alternatives to the traditional cash bonus bid-fixed royalty system. As the Reports explain, "[t]he basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses" (S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977); H.R. Rep. No. 95-590, *supra*, at 139). That reduction is achieved by increasing the payments to be made during the life of the lease, on the theory that the more a bidder expects to pay during the life of the lease the less he will be willing to pay "up front." For instance, in the cash bonus bid-fixed net profit share bidding system, increasing the size of the net profit share demanded can be expected to reduce the size of the cash bonus bid. The relationship remains true regardless of what the bid variable is. Other things being equal, the size of the front end payments varies inversely with the size of the payments over the life of the contract. Thus, a reduction in the size of the front end cash bonuses does not require experimentation with non-cash bonus systems. It requires only an increase in the size of the down stream payments.[47]

The legislative history indisputably demonstrates that Congress intended to require experimentation with new bidding systems. There was substantial

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approve and thereby, nullify the request to exceed the limitation by a resolution of either House.

It was the intention of the committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid. However, it did provide the two limited "escape hatches" in recognition that there could be administrative problems involved in implementing new concepts and procedures.

[47] Attempts have been made in recent lease sales to reduce the size of the front end bids by setting the fixed profit share at 45% and 50%, by increasing the amount of the sliding scale royalty, and even by setting the fixed royalty under the traditional system at 33 1/3% rather than at 16 2/3%.

disagreement about that requirement, which was resolved by the enactment of Section 8(a)(5)(B). We have found nothing in the legislative history of this requirement that suggests any intent to limit the Secretary's discretion to select among the available new bidding systems, or to require him to experiment with any particular system. Instead, the issue under consideration was the extent to which the Secretary of the Interior would be permitted to continue using the traditional cash bonus bid-fixed royalty system.

The bill, as reported by the Senate Committee on Energy and Natural Resources, would have required that the traditional system be used in no more than "66⅔ per centum of the total area offered for lease each year" during the following five years. See § 205(a)(6) of the Senate bill, as set out in S. Rep. No. 95-284, 95th Cong., 1st Sess. 10 (1977). During the debate on that bill, the Senate considered a proposed amendment which would have changed the 66⅔% limit to 50%. See 123 Cong. Rec. 23232-23245 (1977). No one suggested a requirement that any specific alternative, or any specific type of alternative, should be mandated.

Similarly, the bill reported by the House Ad Hoc Committee on the OCS would have required that the traditional cash bonus bid-fixed royalty system be used in no more than 50% of the total area offered for lease each year over the following five years. See § 205(a)(5)(C) of the House bill, set out in H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 11 (1977). In the debate on that bill, the House considered a variety of amendments that would have changed that percentage. See, *e.g.*, the Treen amendment, which would have abolished any restrictions on the discretion of the Secretary of the Interior, 124

Cong. Rec. H420-H424, H429-H430 (daily ed. Jan. 31, 1978),[48] the Brown amendment to the Treen amendment, which would have required alternative systems to be used in not less than 10% nor more than 30% of the area offered for leasing over the next five years (*id.* at H424-H428), and the Emery amendment, which required alternative systems to be used in not less than 20 and not more than 50% of the area leased for sale for the next five years (*id.* at H430-H431). This last amendment, which was adopted by the House (and resembles the Act as passed), reflects a compromise between the two sides. In the House, as in the Senate, the concern was with defining the percentage of tracts to be leased under the traditional system, so that the balance would be leased under experimental systems.

In light of this focus on limiting the Secretary's discretion to use the traditional cash bonus-fixed royalty system, it is not surprising that there is little discussion of how the tests were to be conducted. The aim was to require experimentation, not to prescribe its details.

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[48] The court below found the rejection of the Treen amendment inconsistent with the claim that the Act permits "the Secretary 'complete flexibility' to decide whether or not to issue regulations or utilize any specific alternative bidding systems" (Pet. App. 32a). But all that rejection shows is that Congress refused to permit the Secretary to conclude that only the traditional cash bonus bid-fixed royalty bidding system would be used. The rejection of the Treen amendment does no more than foreshadow the enactment of the limitation on the Secretary's discretion enacted in Section 8(a)(5)(B).

It is nevertheless clear that Congress did not contemplate that each specified system, or any particular novel system, would be tested. Instead, it left the selection of the appropriate systems for testing to expert administrative judgment, under general criteria that it prescribed. In the House bill (reprinted in H.R. Rep. No. 95-590, *supra*, at 11), the criteria for use in selecting "the bidding alternatives from among those authorized by this subsection" are specified in the text of the proposed Act itself. At conference, it was agreed that the criteria should be placed in the conference report, rather than the proposed Act, but the conferees emphasized their agreement with the substance of the criteria—and thus necessarily with the assumption that the Secretary of the Interior would use his judgment in selecting among the alternatives offered in the statute (H.R. Conf. Rep. No. 95-1474, *supra*, at 91-92. See also H.R. Rep. No. 95-590, *supra*, at 140 n.50; 124 Cong. Rec. H599 (daily ed. Feb. 2, 1978) (remarks of Rep. Leggett); 123 Cong. Rec. 23242 (1977) (remarks of Sen. Metzenbaum); 124 Cong. Rec. H190 (daily ed. Jan. 25, 1978) (remarks of Rep. Fish); *id.* at H197 (remarks of Rep. Miller).[49]

The specified considerations include not only increasing competition and providing a fair return to the Federal government, but also developing new oil and gas resources in an efficient and timely manner,

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[49] It is also significant that the legislative history refers to the systems identified in Section 8(a)(1) as those "authorized"—not "required"—for use. See, *e.g.*, H.R. Rep. No. 95-590, *supra*, at 136; S. Rep. No. 95-284, 95th Cong., 1st Sess. 46 (1977). Compare H.R. Rep. No. 95-590, *supra*, at 142, 143.

avoiding both undue speculation and unnecessary delays in exploration, development, and production, and assuring competent and safe operations (H.R. Conf. Rep. No. 95-1474, *supra*, at 92). Selection of bidding systems that are likely to further these considerations, the development of regulations for the utilization of such systems, and the testing of them in actual lease sales are the responsibilities of the Secretaries of Energy and the Interior. They are not required to promulgate regulations for, or to utilize, systems that they conclude, in the exercise of their expert judgment, will cause inefficiencies and delays in the exploration, development and production of OCS oil and gas.[50]

Respondents disagree with the selections made, and urge that other systems would better further the statutory purposes. But Congress was well aware of disagreements over the relative desirability of the various systems; that is why it required experimentation. It did not go further, and require testing of the specific systems the respondents prefer. In taking that further step, the court below exceeded its proper function, and gave respondents what they were unable to obtain from Congress. See H.R. Rep. No. 95-590, *supra*, at 117.

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[50] For the reasons explained in the preambles to the final variable net profit share and the proposed variable work commitment bidding system regulations, the Secretaries of Energy and of the Interior have serious reservations about the desirability of those systems. See App., *infra*, 1a-5a.

CONCLUSION

The judgment of the court of appeals should be vacated and the action remanded to the district court with directions to dismiss for lack of standing. If the Court considers the case on the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
EDWARD J. SHAWAKER
Attorneys

DANA B. OTT
Office of the Solicitor
Department of the Interior

RICHARD A. CORREA
Office of the General Counsel
Department of Energy

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APPENDIX

I. The preamble to the proposed work commitment bidding system regulation states in pertinent part (46 Fed. Reg. 20526-20527 (1981):

> While [some] beneficial impacts * * * may occur, DOE anticipates that the proposed variable work commitment bidding system may also have some negative effects on OCS exploration and development. First, although the work commitment bidding system is intended to encourage diligent exploration of OCS tracts, it is also possible that utilization of a variable work commitment bidding system could have the unintended result of encouraging "over-exploration" on a given work commitment tract, to the point where scarce physical resources [*e.g.*, drilling rigs, drill pipe, etc.] would be misutilized. In cases where "over-exploration" occurred, it could be expected that fewer scarce physical resources would be allocated to the exploration of alternative prospects. It is also possible that, in the aggregate, more OCS exploration may occur than is economically efficient.
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> Second, the application of a variable work commitment bidding system may cause distortions in the ordering of tract development. Firms may change the order in which they would develop tracts in various OCS regions given their perception of the economic incentives or disincentives that may be inherent in the various alternative bidding systems. Other things being equal, firms may develop tracts with high cash bonus payments first, in order either to recoup expenditures early through production revenue

or to maximize tax write-offs. Since a variable work commitment system would reduce initial sunk costs, and therefore the need to recoup those expenditures, tracts leased under this system may receive a lower priority for exploration than those leased under systems that require higher front-end payments. Consequently, efficient and orderly development on the OCS may be somewhat undermined by use of this bidding system.

Third, assuming that most firms will opt to post a performance bond rather than a cash deposit for the full amount of the work commitment, a variable work commitment bidding system may lower the incentive for diligent exploration. Since the fixed cash bonus under the work commitment bidding system is expected to be lower than the front-end bonus under other bidding systems, and payment of any unfulfilled work commitment obligation is deferred, firms may tend to delay exploration of tracts leased under a variable work commitment bidding system relative to tracts leased under bidding systems without a work commitment component. This effect may be offset, however, by the tax benefits of expensing certain exploration expenditures [*i.e.*, write-offs of certain costs in the year they are incurred, rather than amortizing them over a longer time period] and of the current investment tax credit equal to 10 percent of new "qualified" investments.

Fourth, a variable work commitment bidding system may contribute to inequitable risk sharing between the government and the firms undertaking the exploration. Like other bidding sys-

tems, the work commitment bidding system could be subject to the criticism that the risks of unsuccessful exploration ventures are not adequately borne by the lessee. For example, on tracts where the results of initial exploration are favorable, the proposed system would encourage the lessee to continue diligent exploration by providing for partial reductions of the cash deposit or performance bond to help finance exploration activities. Therefore, total payments to the government would be lower under a variable work commitment bidding system than under other OCS bidding systems. It is possible, although unlikely, that the government may receive payments in excess of the amount it would have received under the traditional cash bonus bidding system. This would only occur, however, in those situations where the amount that would be paid as a bonus is small relative to the amount to be spent on exploration, and where initial exploration was decisively negative. On average, the government should expect a lower fixed cash bonus to attract a higher work commitment bid.

Finally, several other issues are to be noted. There may be significant administrative costs incurred on the part of both the government and industry associated with the utilization of a variable work commitment bidding system. The verification of exploration expenditures applied in satisfaction of the work commitment may be costly and time consuming. Consideration must also be given to the difficulty and potential costs, on the part of the government, of evaluating a firm's exploratory program and making a judgment whether to terminate the allowability of

exploration costs from a portion of a lease that may be applied in satisfaction of the work commitment prior to the expiration of the primary term of the lease.

II. The preamble to the variable net profit share bidding system regulation states in pertinent part (46 Fed. Reg. 29681 (1981)):

> [T]he most immediate effect of using the variable net profit share bidding system, in place of traditional cash bonus systems, will be a reduction in front-end cash bonuses and a consequent reduction of funds flowing into the U.S. Treasury at the time of the lease sale. The amount of any such reduction will depend upon the level at which cash bonuses are fixed for any OCS lease sale. The reduction in bonus amounts may eventually be offset, at least in part, to the extent that lessees make contingency payments during production; however, any such contingency payments would not begin for several years after issuance of the lease. It is also possible that these lower cash bonus amounts may lead to speculative bidding. These conclusions found considerable support in the public comments.
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> To the extent that very high profit share rates are bid, DOE anticipates that minimum economical commercial field sizes may increase and that there may be premature abandonment of leases. Either of these results will lead to reduced resource recovery and losses in national income, that is, in net economic value. In addition, high profit share rates are likely to reduce the incentive for exploration and cause overin-

vestment in development after discovery of a commercial field. High profit share rates may also cause inefficient distortions in production patterns. All of these impacts will tend to reduce resource production, national income, and the Federal revenues yielded by OCS development. Further, in any bidding system where the bid variable is not a cash bonus, there is no assurance that the high bid on a tract will yield the greatest return to the public or to the government over the life of the lease.

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